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April 5, 2006

Hon. John Richardson
Speaker of the House
Maine House of Representatives
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Augusta, Maine 04333-0002

RE: Constitutionality of Initiated Bill 1, L.D. 2075, *An Act to Create the Taxpayer Bill of Rights*

Dear Speaker Richardson:

In your letter of March 29, 2006, you have asked for an opinion concerning the constitutionality of Initiated Bill 1, L.D. 2075, *An Act to Create the Taxpayer Bill of Rights* (known as the "TABOR initiative"), including in particular the constitutionality of proposed Title 5 M.R.S.A. § 2043, which requires a 2/3 vote of each House of the Legislature as well as approval of a majority of voters at a statewide election before any measure to increase state revenue may become law. You questioned whether the TABOR initiative is constitutional under Article IX, section 9, or any other provision of the Maine Constitution. In accordance with your request, and given the time constraints posed by the Legislature's imminent adjournment, we have focused on the provisions in the bill relating to state revenue, which present the most significant constitutional issues. Because the same procedures set forth in proposed section 2043 apply to legislative enactments that would either raise revenue or spend available revenue in excess of expenditure limits in the initiated bill, we believe that other constitutional defects we have identified in section 2043 affect both, and thus have addressed the expenditure provisions of the initiative to that extent. We have not analyzed and thus do not address the revenue and expenditures limits applicable to units of local government.

Based on the analysis described below, we believe that a court would likely conclude that the procedural limitations in the TABOR initiative requiring a 2/3 vote of each House of the Legislature as well as statewide voter approval for enactment of any measure to increase state revenue violate several provisions of the Maine Constitution. First, the supermajority and voter approval requirements result in a surrender of the Legislature's power of taxation, in violation of Article IX, section 9. Second, the provisions that subject emergency enactments to voter approval and narrow the definition of emergency unconstitutionally limit the Legislature's authority under Article IV, part 3, section 16. Third, by subjecting every legislative act that either increases revenue or exceeds expenditure caps to voter approval at a statewide referendum, the TABOR initiative attempts to bind future legislatures and would effectively create a referendum process that is inconsistent with the requirements of Article IV, part 3, sections 16-22 of the Maine Constitution. Finally, the supermajority requirements that apply to legislative acts exceeding either the revenue or expenditure caps are inconsistent with the Legislature's constitutional power to enact non-emergency measures by simple majority and are therefore unenforceable under Maine's Constitution.

Background

We begin by summarizing the provisions in L.D. 2075 that are primarily at issue. L.D. 2075 proposes to enact a new chapter 167 in Title 5, entitled "The Taxpayers' Bill of Rights." It defines an "increase in revenue" to include any tax levy that causes a net gain in state revenue,¹ including a new tax or fee; an increase in the rate or the base of any existing tax or fee; repeal or reduction of any tax exemption, credit or refund; extension of any tax or fee increase that is expiring; and any reduction in benefits or eligibility under certain tax reimbursement programs without corresponding increases to offset those reductions. 5 M.R.S.A. § 2041(2)(A)-(D).² Proposed section 2043 sets forth the procedural requirements that must be met before any such increase in revenue may become law. First, the measure "must be approved by a vote of 2/3 of all the members of each House of the Legislature;" and, second, it "must be approved by a majority of the voters" at the next general election, or at any regular or special election before the general election if the Legislature determines the increase should take effect sooner. § 2043(1)(A)&(B) and § 2043(3). Voter approval of a revenue increase is not required if annual state revenue "is less than annual payments on general obligation bonds, required payments related to pensions and final court judgments." § 2043(2)(A). The TABOR initiative also specifies a formula for limiting state expenditures and provides that any revenue exceeding those expenditure limits may be spent only if approved according to the procedure for revenue increases set forth in proposed section 2043 (*i.e.*, the 2/3 legislative vote and voter approval requirements). § 2044(1), (3) & (4).

¹ References to revenue throughout this opinion include only state revenue, not revenue raised at the local level. We also note, for the sake of clarity, that by defining "increase in revenue" in a manner designed to establish a cap on tax and fee increases, the references to revenue in the TABOR initiative exclude some revenue sources that are normally recognized in the budget process, *e.g.*, funds the state receives from the federal government.

² Hereafter, all references to the proposed new sections of law in the TABOR initiative are to Title 5, unless otherwise indicated.

The procedure for enacting emergency tax measures is slightly different. An emergency tax “must be approved for a specified time period by a 2/3 majority of the members of each House of the Legislature” and must then be submitted for approval by the voters at the next statewide election. § 2049(1). If the voters do not approve it, the emergency tax “expires 30 days following the election.” § 2049(2). Under this bill, “emergency” does not include “economic conditions” or “revenue shortfalls.” § 2043(2).

Finally, the TABOR initiative provides that any change in the rate of excise tax on motor fuels and distillates resulting from the adjustment made pursuant to the statutory formula in 36 M.R.S.A. § 3321(1) “may only take effect if approved by a majority of the voters at a regular or special election.” L.D. 2075, § 9, proposing 36 M.R.S.A. § 3221(5).

Analysis and Discussion

I. Surrender or Suspension of the Legislature’s Power of Taxation (Me. Const., art. IX, § 9)

Article IX, section 9 of the Maine Constitution contains a simple, emphatic statement:

The Legislature shall never, in any manner, suspend or surrender the power of taxation.

Several other states have similar constitutional provisions, but the strong wording of the prohibition in Maine’s Constitution makes it “unusual.” *Boston Milk Producers, Inc. v. Halperin*, 446 A.2d 33, 40 (Me. 1982). Section 9 was adopted by the people of Maine, effective on January 5, 1876, and its original purpose “was to curb a legislative practice of including in charters of railroads and canal companies clauses purporting to create certain permanent immunities from taxation.” *Id.* However, the Law Court held in *Boston Milk Producers* that its application is not limited to that original purpose:

[T]he language of the prohibition is broad enough to include a surrender or suspension of the taxing power having some effect other than creation of a permanent tax immunity. The words “never” and “in any manner” create a *strong and sweeping prohibition*.

446 A.2d at 40 (emphasis added).

Under the Constitution of the State of Maine, ensuring that the flow of revenue into the State Treasury is sufficient for the essential needs of the State and its citizenry “is solely a legislative function.” *Morris v. Goss*, 147 Me. 89, 103-104, 83 A.2d 556, 564 (1951). Indeed, the Law Court has emphasized that “[t]axation is a sovereign right,” and that “[t]his right is so vital and so essential to the existence of government that the suspension or surrender of the power of taxation by the Legislature is expressly prohibited by the Constitution of this State. Const. Art. IX, Sec. 9.” *Id.*, 83 A.2d at 563.

The "power of taxation," pursuant to Article IX, section 9 includes the power to decide what shall be taxed and at what rate. See *Morris v. Goss*, 147 Me. at 103, 83 A.2d at 564 (exercise of power to tax involves determining nature of tax and its effective imposition). It includes the power to provide for exemptions, credits, rebates and reimbursements. See *Delogu v. City of Portland*, 2004 ME 18, ¶¶26-27, 843 A.2d 33, 39-40, citing *Greaves v. Houlton Water Co.*, 143 Me. 207, 211, 59 A.2d 217, 219 (1948) and *Blair v. State Tax Assessor*, 485 A.2d 957, 960 (Me. 1984). The cases interpreting Article IX, section 9 reveal how the courts have delineated what constitutes an impermissible delegation or surrender of this power.

In *Boston Milk Producers*, for example, the Law Court considered legislation that established a floating rate of milk tax based on the average annual Class I price that was paid to Maine producers by Maine dealers for milk of a certain butterfat content. The tax legislation explicitly provided, however, that it was not to take effect unless approved by the vote of a majority of certified milk producers. The plaintiffs challenged the tax as an unconstitutional surrender of the Legislature's power to tax, and the court agreed. The court concluded that the power to tax "was surrendered, in effect," to the certified producers of milk by the provision that the milk tax could not come into effect without the favorable vote of a majority of those certified milk producers. 446 A.2d at 41. As the Law Court explained in a later opinion, "the invalidity arose from the fact that the vote by the private group of milk producers had no significance independent of deciding whether the new tax would go into effect." *Lucas v. Maine Comm'n of Pharmacy*, 472 A.2d 904, 911 n.12 (Me. 1984).

By comparison, the Law Court and the Justices have concluded that legislation that adjusted tax rates or other aspects of taxes based on objective, reliable criteria that were sufficiently independent of the affected taxpayers did not constitute a surrender of the power of tax in violation of Article IX, section 9. For example, in 1982, the Justices concluded that initiated legislation that would "index" certain aspects of the Maine Income Tax Law (e.g., personal exemption, standard deduction, and tax bracket amounts) to annual changes in the Consumer Price Index ("CPI"), published by the Bureau of Labor Statistics of the United States Department of Labor, was not an unconstitutional delegation of the taxing power to the Department of Labor in violation of Article IX, section 9. *Opinion of the Justices*, 460 A.2d 1341, 1347-49 (Me. 1982). The Justices -- distinguishing this legislation from that at issue in the *Boston Milk Producers* case -- emphasized that the CPI was an objective economic criterion that was widely used to measure adjustments in pensions, wages and other money matters. Not all delegations of legislative functions related to tax laws would violate Article IX, section 9, the Justices stated. Rather, "the goal has been to make sure that delegated powers were guided by meaningful standards." *Id.* at 1348. The CPI was a meaningful standard, in the court's view.

Likewise, in *Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food & Rural Resources*, 483 A.2d 1213 (Me. 1984), the Law Court considered a provision in a milk promotion tax that set the rate of tax as a given percentage of the price of Class I milk, where that price was fixed by the Maine Milk Commission under 7 M.R.S.A. § 2954. The Milk Commission's responsibilities to set this price were governed by a detailed list of considerations the Commission was to take into account. The court concluded that the price of Class I milk was "set on legislatively sufficient criteria for a significant independent purpose" that was outside its

impact on the promotion tax. *Id.* at 1220. In other words, unlike the tax in the *Boston Milk Producers* case, the Milk Commission was directed to set the price of Class I milk under the objective criteria set out in the statute, independent of the fact that the price would also affect the amount of promotion tax imposed on Maine milk producers. The court held there was no unconstitutional delegation of the power to tax. *Id.*³

Other Maine cases have addressed legislation purporting to create perpetual immunities or exemptions from taxation. For example, in *Greaves v. Houlton Water Co.*, 143 Me. 207, 213, 59 A.2d 217, 220 (1948), the court held that a 1943 Private and Special Law exempted from municipal property tax certain property owned by the defendant Houlton Water Company. The court then addressed the plaintiff tax collector's alternative argument that a law creating such an exemption amounted to an improper "suspension" of the Legislature's power to tax under Article IX, section 9. In strong language, the court rejected that argument and ruled that, although the property at issue was exempt from tax at that point in time, the Legislature was free to repeal that exemption in the future. The court explained that:

No matter what words the Legislature uses, or what attempts it makes to pass an exemption statute without the right to change or repeal it, it cannot bind itself so as to prevent a future change or repeal.

Id. at 213, 59 A.2d at 220. *See also Blair v. State Tax Assessor*, 485 A.2d 957, 960 ("We cannot presume that the legislature would intentionally enact a statute that would contract away the power to tax on a permanent basis").

Likewise, in a 1959 *Opinion of the Justices*, the issue was whether legislation that purported to immunize "Forest Crop Land" from legislative power ever to change its tax status violated Article IX, section 9. 155 Me. 30, 152 A.2d 81 (1959). The Justices concluded that such legislation ran afoul of Article IX, section 9, because a Legislature lacks the power to prevent a future Legislature from changing the tax status of particular property. *Id.* at 48, 152 A.2d at 90.

Based on the precedents discussed above, we believe that a court would likely conclude that proposed section 2043 violates Article IX, section 9 in two respects. First, the requirement that any revenue raising bill be approved by a majority of the voters statewide amounts to a "surrender" of the Legislature's power of taxation. Second, the requirement that a 2/3 vote of both Houses of the Legislature is needed for any future tax increase purports to deprive a simple majority of the Legislature of the power to enact non-emergency taxes and thus amounts to a partial, but substantial, "surrender" or "suspension" of the Legislature's power of taxation.

³ *See also Op. Me. Att'y Gen.* 96-3 (vesting of power in Bureau of Alcoholic Beverages to determine amount of tax on wine and liquor would not violate Article IX, section 9, where Bureau had no discretion but was confined to calculating tax based on events beyond its control). By contrast, in 1996 the Legislature enacted a sardine tax to fund various promotional efforts and activities of the newly established Sardine Council, but the bill left to the Sardine Council the discretion to set the amount of the tax. The Attorney General opined, for the same reasons articulated here, that this was an unconstitutional delegation of the Legislature's power of taxation. *Op. Me. Att'y Gen.* 96-2.

First, to the extent that the TABOR initiative requires that a majority of the voters statewide approve any measure increasing revenue before it takes effect, the bill runs afoul of Article IX, section 9 based on the Law Court's decision in *Boston Milk Producers*, 446 A.2d at 40. There, the court concluded that the Legislature's power to tax was unconstitutionally "surrendered" to the certified producers of milk by a provision that the milk tax at issue would not come into effect without the favorable vote of a majority of those certified milk producers. *Id.* at 41. The constitutional defect "arose from the fact that the vote by the private group of milk producers had no significance independent of deciding whether the new tax would go into effect." *Lucas*, 472 A.2d at 911 n.12. Here, as in *Boston Milk Producers*, proposed section 2043 is, in effect, a "surrender" of the power to tax in violation of Article IX, section 9, to the extent that any future tax increase is dependent on an affirmative vote by the people of the state.

Certainly the Law Court has upheld legislation that adjusts tax rates or other aspects of taxes based on objective, reliable criteria that were sufficiently independent of the affected taxpayers. See *Opinion of the Justices*, 460 A.2d 1341 (approved provision in Maine income tax law that indexed personal exemption, standard deduction, and tax bracket amounts to annual changes in CPI), or *Maine Milk Producers, Inc. v. Commissioner of Agriculture, Food & Rural Resources*, 483 A.2d 1213 (approved provision in milk promotion tax that set rate of tax as given percentage of price of Class I milk, where price was fixed by Maine Milk Commission under 7 M.R.S.A. § 2954). However, proposed section 2043 is very different from the legislation approved in those cases. Section 2043 would subject every piece of legislation that results in increased tax revenues to approval by a majority of voters at a statewide election – not based on objective criteria or some independent standard, but based simply on whether the voters wish to have that particular tax increase become law.

It is important to distinguish between what this bill purports to do – that is, provide voters with an automatic right to approve or disapprove every measure to increase tax revenue -- and the exercise of the people's power to legislate pursuant to Article IV, part 3 of the Maine Constitution. This opinion is not suggesting that the people lack the right to attempt to veto revenue legislation under Article IV, part 3, section 17, or to initiate a repeal of a particular revenue bill under Article IV, part 3, section 18.⁴ However, the TABOR initiative seeks to fundamentally alter the power vested in the Legislature by giving voters the right to veto every measure that increases tax revenue. For this reason, we believe that a court would conclude that such a bill violates Article IX, section 9.⁵

⁴ The question of whether the people can initiate a bill to raise revenue without violating article IV, section 9 (requiring that "all bills for raising a revenue shall originate in the House of Representatives") has not been addressed by the Law Court or the Justices to date. In addressing a citizens' initiative to repeal the uniform property tax, however, the Justices concluded that they were "satisfied from a historical analysis of Amendment XXXI to the Constitution of Maine that initiative can properly be used when the subject matter is revenue legislation." *Opinion of the Justices*, 370 A.2d 654, 667-68 (Me. 1977).

⁵ For these same reasons, we believe that a court would conclude that the proposed new subsection 3321(5) is an unconstitutional surrender of the power of taxation in that it provides that a change in the rate of excise tax will take effect only if approved by a majority of voters. Section 3321 as currently written provides that this rate is indexed to the CPI, which would be permissible under *Opinion of the Justices*, 460 A.2d 1341; 1347-49 (Me. 1982).

We believe that a court also would likely conclude that requiring a 2/3 vote of both Houses of the Legislature for all future tax increases is a partial -- though significant -- "surrender" or "suspension" of the Legislature's power of taxation. Practically speaking, the Legislature may be able to muster the 2/3 vote in each House required by this bill for any tax future increase. However, Maine's Constitution does not require a 2/3 vote for non-emergency enactments, and requiring that supermajority burdens the exercise of the Legislature's taxing power. This proposed requirement also places the power to prevent a non-emergency tax increase into the hands of just over 1/3 of the members of each House of the Legislature, as opposed to a simple majority. In that respect, it "surrenders" the power to 1/3 of the members of each House. Since Article IX, section 9 prohibits the Legislature from "in any manner" surrendering or suspending the power to tax -- including the power to impose a tax, increase the rate, expand the tax base, or to repeal or reduce exemptions, as listed in proposed section 2041(2) -- we believe that a court would likely conclude that requiring a supermajority vote from each House for any future tax increases violates Article IX, section 9.⁶

II. Limitation of Legislature's Power to Enact Emergency Measures (Me. Const. art. IV, pt. 3, § 16)

Article IV, part 3, section 16 of the Maine Constitution provides in pertinent part:

No act or joint resolution of the Legislature, ... shall take effect until 90 days after the recess of the session of the Legislature in which it was passed, *unless in case of emergency*, which with the facts constituting the emergency shall be expressed in the preamble of the act, *the Legislature shall*, by a vote of 2/3 of all the members elected to each House, *otherwise direct*. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety ...

(Emphasis added).

The purpose of the 90-day delay in the effective date of most bills is to allow the opportunity for a people's veto pursuant to Article IV, part 3, section 17.⁷ That opportunity is foreclosed, however, when the Legislature determines that a particular measure is "immediately necessary" for public peace, health or safety, and adopts the bill by a 2/3 vote of each House. If the Legislature makes findings of fact constituting an emergency within the meaning of Article IV, part 3, section 16, and enacts the measure by a 2/3 vote of each House of the Legislature, the

⁶ At least one other state Supreme Court with an analogous state constitutional provision has reached a similar conclusion as to the meaning of this language. In explaining the origin and meaning of Article IX, section 1 of the Arizona Constitution ("The power of taxation shall never be surrendered, suspended, or contracted away"), the Arizona Supreme Court ruled that "Art. IX, § 1 was designed to leave legislators unencumbered in so far as their power to impose taxes." *Switzer v. Phoenix*, 341 P.2d 427, 431 (Ariz. 1959).

⁷ Indeed, Article IV, part 3, section 16 was adopted by the same constitutional amendment that created the citizens' rights to initiate legislation and to suspend the effect of legislation by filing a people's veto referendum petition. Maine Constitutional Amendment XXXI, 1907, c. 121, effective Jan. 6, 1909 (adopting sections 16-22 of art. IV, pt. 3).

measure takes effect immediately and is not subject to a people's veto referendum. *Morris v. Goss*, 147 Me. 89, 93, 83 A.2d 556, 559 (1951).

The Law Court has recognized that the Legislature's power to enact emergency measures is particularly important in the area of taxation. As the court stressed in *Morris v. Goss*, "the flow of revenue into the treasury of the State is indispensably necessary to enable the State to function," and the Legislature must be able to enact a tax bill as an emergency measure if it finds the additional revenue is required to meet essential needs of the State. 147 Me. at 103-104, 83 A.2d at 564-65. In answering the Senate's questions regarding a pending initiative to repeal the uniform property tax in 1977, the Justices noted that the people have the ability to repeal emergency legislation through the initiative process, but may not use the referendum procedure in Article IV, part 3, section 17 for this purpose. *Opinion of the Justices*, 370 A.2d 654, 669 (Me. 1977). Later that same year, the Justices, sitting as the Law Court, held unequivocally that the Legislature has the authority "to pass an emergency bill amending legislation that falls within the scope of an initiative and thereby make the amending measure effective immediately." *McCaffrey v. Gartley*, 377 A.2d 1367, 1371 (Me. 1977).

While the TABOR initiative would allow the Legislature to enact a bill to increase revenue (through taxes or fees) by emergency on a 2/3 vote of each House, proposed section 2049 provides that such a measure could remain in effect only until a statewide election occurs. Unless approved by a majority of voters, the measure would expire 30 days following that election. Thus, the initiative purports to subject every emergency revenue raising measure to a popular vote without compliance with the constitutional requirements governing initiatives that the Law Court has determined would clearly apply.

The TABOR initiative also limits the definition of "emergency" to *exclude* "economic conditions" and "revenue shortfalls" -- circumstances that clearly could support a finding of emergency within the meaning of Article IV, part 3, section 16. As the Law Court has noted, the court's review of an emergency preamble is limited to questions of law: whether the Legislature has expressed facts supporting the emergency finding and whether those facts constitute an emergency within the meaning of the constitution. Questions of fact, such as the determination of whether a particular set of circumstances does in fact constitute an emergency, are within the exclusive province of the Legislature to determine. *Morris v. Goss*, 147 Me. at 99, 83 A.2d at 561. The limitations that the TABOR initiative seeks to impose on the ability of the Legislature to enact emergency measures are nowhere expressed in Article IV, part 3, section 16, and are inconsistent with the broad authority granted by that provision.

The "provisions of the Constitution bind not only the Legislature but the people." *Common Cause v. State of Maine*, 455 A.2d 1, 17 (Me. 1983), quoting *Opinion of the Justices*, 132 Me. 519, 522 (1933). And "even the people must not be allowed to interfere with the exercise by the Legislature of the law making power which has been conferred upon that branch of government by the Constitution." *Morris v. Goss*, 147 Me. at 106-107, 83 A.2d at 565. Thus, the citizens cannot enact by direct initiative a measure that violates any requirement of the Constitution.⁸

⁸ See, e.g., *Opinion of the Justices*, 2004 ME 54, 850 A.2d 1145 (concluding that citizens' initiated tax cap legislation violated Article IX, section 8).

To the extent the TABOR initiative purports to restrict the Legislature's authority to enact emergency measures generating revenue through taxes or fees, by narrowing the definition of emergency and requiring ratification by the voters, we believe that a court would likely conclude it is unconstitutional.

III. Conditioning the Effectiveness of Legislation on Voter Approval

The Maine Constitution reserves to the people the power to initiate legislation (including the repeal or amendment of an existing statute) under Article IV, part 3, section 18, as well as to veto non-emergency legislation before it takes effect, under Article IV, part 3, section 17. To do so, however, the citizens must meet certain constitutional requirements, which include gathering a sufficient number of valid signatures from registered voters (representing 10% of the total vote for Governor cast in the previous gubernatorial election) on a petition to qualify the initiative or people's veto referendum for the ballot. Me. Const., art. IV, pt. 3, §§ 17-20. In addition, the Legislature may choose to enact particular measures expressly conditioned upon ratification by the people at a statewide referendum vote. *Id.* §19. The Maine Constitution provides no other method by which the people may legislate.

By subjecting every net increase in state revenue and every expenditure of revenue in excess of spending limits to a statewide vote of the people before it may become law, the TABOR initiative in effect attempts to create a new referendum process. It does so by statute, however, without amending the Maine Constitution. The statute TABOR proposes to enact also purports to bind future legislatures to follow this referendum process before such revenue increases and spending measures may become law. Both aspects of TABOR raise significant constitutional issues.

While there is no direct precedent in Maine on the issue of creating a new referendum process, a case decided by the Washington Supreme Court provides a helpful analysis. The citizens of Washington State adopted a measure by direct initiative that, similar to TABOR, proposed to condition every tax increase on statewide voter approval. The Washington Supreme Court struck it down as unconstitutional on the grounds that neither the citizens, nor the Legislature, could add a new referendum process by statute. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 792-800 (Wash. 2000). The court found that the provisions of the state constitution authorizing citizen initiatives and referenda are exclusive. And although the Legislature in Washington has discretionary authority to refer particular measures to the voters for approval at a statewide referendum, as does the Maine Legislature pursuant to Article IV, part 3, section 19, the court held in *Amalgamated Transit* that even the Legislature itself could not condition enactment of all future revenue legislation on statewide voter approval.⁹ The analysis used in *Amalgamated Transit* is quite persuasive, and the provisions of Washington's constitution are similar to Maine's with respect to the citizen initiative and referendum process.

⁹ The court held that it would be unconstitutional for the Legislature to delegate its law-making authority to the people in this fashion. Such a change would have to be made by constitutional amendment. *Amalgamated Transit*, 11 P.3d at 798.

With regard to the constitutionality of imposing restrictions on future legislatures, the Maine courts have adopted the well established principle that neither acts of the Legislature nor legislation initiated by the citizens can bind the lawmaking powers of future State Legislatures. *Opinion of the Justices*, 673 A.2d 693, 695 (Me. 1996). *Accord SC Testing Technology, Inc. v. Dept. of Environmental Protection*, 688 A.2d 421, 425 (Me. 1996); *see also Manigault v. Springs*, 199 U.S. 473, 487 (1905) (“As this is not a constitutional provision, but a general law enacted by the legislature, it may be repealed, amended or disregarded by the legislature which enacted it...[I]t is not binding upon any subsequent legislation...”). Indeed, the Legislature has plenary authority to enact all reasonable laws, subject only to those limitations specified in the state or federal constitution. Me. Const., art. IV, pt. 3, §1.

Whether initiated by the people, under Article IV, part 3, section 18, or referred to the people by the Legislature, under Article IV, part 3, section 19, the referendum process may be invoked only on a measure by measure basis. Neither the citizens nor the Legislature can bind future legislatures by providing that no measures within a given category, such as revenue or spending legislation, may become law until and unless approved by the voters at a statewide election.

For this combination of reasons, we believe that a court would likely conclude that the requirements for voter approval in the TABOR initiative are unconstitutional.

IV. Requiring Supermajority Vote of Legislature for Non-emergency Enactments

“Legislative power is defined by limitation, not by grant, and is absolute except as expressly or by necessary implication restricted by the Constitution.” *Opinion of the Justices* 623 A.2d 1258, 1262 (Me. 1993).¹⁰ Under the Maine Constitution, a 2/3 vote of the Legislature is required only for certain limited actions, such as to impose a mandate on units of local government, change the use of state park land, propose a bond issue or an amendment to the State Constitution, or override a gubernatorial veto;¹¹ otherwise, a majority vote is sufficient. The Constitution does not specify any particular vote required to enact non-emergency measures to increase state revenue through taxes or fees.

Proposed section 2043 in the TABOR initiative seeks to require a supermajority of a 2/3 vote in both Houses for any increase in revenue (through taxes or fees) or any expenditure in excess of the specified limits to become law. Because there is no requirement for such a supermajority in Maine’s Constitution, however, we believe a court would find such a

¹⁰ As set forth in Article IV, part 3, section 1:

The Legislature, with exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.

¹¹ *See* Me. Const. art. IV, pt. 3, §2 (override veto); art. IV, pt. 3, §1-A (adopt apportionment plan); art. V, pt. 1, §8 (change confirmation process); art. IX, §14 (propose bond issues); art. IX, §21 (impose unfunded mandates); art. IX, §23 (change use of state park land); art. X, §4 (propose a constitutional amendment).

requirement unenforceable. In addition, imposing a supermajority requirement would violate the principle, noted in part III above, that neither acts of the Legislature nor those initiated by the citizens can bind the lawmaking powers of future State Legislatures. *Opinion of the Justices*, 673 A.2d 693, 695 (Me. 1996). To be enforceable, a supermajority vote requirement for enactment of measures to increase the revenue of the state through taxes or fees would have to be inserted in the Constitution.

Conclusion

As detailed in our analysis, the TABOR initiative seeks to alter procedures established under Maine's Constitution in a number of ways: by surrendering part of the Legislature's power of taxation to the voters and to a minority of the members of the House and Senate; by restricting the Legislature's exercise of its emergency lawmaking powers; by imposing voter approval requirements on acts of the Legislature in a manner other than that prescribed by Article IV, part 3, sections 16-22; and by imposing a supermajority voting requirement on non-emergency legislation. Such changes cannot be implemented by statute, but only by constitutional amendment.¹² Accordingly, we believe that a court would likely find that these provisions of the TABOR initiative violate Maine's Constitution.

Sincerely,



G. Steven Rowe
Attorney General

¹² Indeed, we presume it is for this reason that other states adopting requirements for a supermajority or vote of the people to enact tax and spending increases have largely been accomplished by constitutional amendment. *See, e.g.*, Colo. Const., art. X, § 4 (adopting a Taxpayer Bill of Rights amendment on Nov. 2, 1992); Mo. Const., art. X, §§ 16 – 19 (adopted Nov. 4, 1980). Maine's Constitution does not authorize constitutional amendments to be initiated by the citizens. Me. Const. art. IV, pt. 3, § 18(1) ("the electors may propose to the Legislature for its consideration any bill, resolve, or resolution, including bills to amend or repeal emergency legislation, but not an amendment of the State Constitution, by written petition").